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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 444

EUGENE W. OSMENT, PETITIONER,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
S. L. TRUSTY,
ROBERT A. WILSON,
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioner respectfully petitions for a writ of certiorari to review a decision of the Supreme Court of Missouri reversing a judgment in petitioner's favor entered in the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employer's Liability Act as amended effective August 11, 1939 (45 U. S. C. A. Sec. 51, *et seq.*) 52 Stat. 1404.

Summary Statement of Matter Involved.

The petitioner, Eugene W. Osment, a railroad worker, was injured totally and permanently while in the employ of respondents, interstate carriers. His injury resulted

from the rough horseplay of an extraordinary strong fellow employee whom respondents keep in their employ though they knew he was addicted to engage in horseplay that was dangerous to the other employees, and from the deliberate failure of a Company guard to intervene and prevent this employee from choking your petitioner to unconsciousness although this guard was charged with the duty to prevent such dangerous and foolish horseplay. Your petitioner brought action under the Federal Employers' Liability Act as amended effective August 11, 1939 (45 U. S. C. A. Sec. 51 *et seq.*), 52 Stat. 1404, and was awarded a verdict of Fifty Thousand Dollars in the trial court, which was reduced on remittitur to Thirty-Five Thousand and judgment entered thereon. Defendants therein, respondents here, appealed to the Supreme Court of Missouri and the cause was referred to Division Two of that Court. Division Two of the Supreme Court of Missouri reversed the judgment. A petition for rehearing was filed and denied. Your petitioner then, on June 11, 1942, filed a petition in the Supreme Court of the United States for a writ of certiorari to the Supreme Court of Missouri. Nine copies of this petition are being filed with the Clerk of the United States Supreme Court as Exhibit "A" of the instant petition for a writ of certiorari and we incorporate it herein by reference.

On October 12, 1942, the Supreme Court of the United States denied this first petition for a writ of certiorari in this case stating:

> "Per Curiam: The last clause of Sec. 4 of the 1890 amendments to Article VI of the Missouri Constitution provides that 'when a division of the Supreme Court of Missouri in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.' In Scheufler *v.* Manufacturing Lumbermen's Underwriters, decided July 7th, 1942, the Su-

preme Court of Missouri stated that under this clause 'either division on application or its own motion and for reasons deemed sufficient though not enumerated in the section may order a cause transferred to the court en banc'. 163 S. W. 2d 749, 750. In this case petitioner made no application to transfer the cause from Division Two where it was heard and decided, to the court en banc. As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction. Gorman *v.* Washington University, 316 U. S. 98, and cases cited."

Pursuant to this decision, your petitioner herein filed a motion in the Missouri Court requesting the court to exercise its discretion and to transfer the cause to the court en banc or to refuse to transfer the cause to the court en banc (R. 569). An order of the court was sought and granted giving leave to file this motion (R. 569). The respondents then filed a motion to strike petitioner's motion to transfer (R. 574) and on June 7, 1943, an order was entered in the Supreme Court of Missouri sustaining the respondents' motion to strike (R. 588).

We shall not set forth herein a detailed summary of the facts involved in this case, but respectfully direct this Honorable Court's attention to Exhibit "A" of this petition wherein the facts, the theories of recovery, and the evidence are fully discussed.

Statement as to Jurisdiction.

The Court has jurisdiction over this case under the provisions of the Act of Congress of February 13, 1925, Section 237-2; 28 U. S. C. A., Section 344-B providing that this Court has jurisdiction—

"to require that there be certified to it for review and determination with the same power and authority

> and with like effect as if brought up by appeal any clause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; * * *."

This case involves a federal statute, specifically the Federal Employers' Liability Act as amended, effective as of August 11, 1939, 53 Stat. 1404 (Title 45 U. S. C. A. Sec. 51 *et seq.*).

The original petition for a writ of certiorari filed in the Supreme Court of the United States in this cause, Exhibit "A" hereof, was denied on the grounds that petitioner had not exhausted the appellate review provided for by state law in that after Division Two of the Supreme Court of Missouri rendered its decision reversing the judgment of the trial court no application was made by your petitioner for a transfer of the case from the division of the court to the court en banc.

Section 1 of the Amendment of 1890 to article 6 of the Constitution of the State of Missouri establishes two divisions of the Supreme Court of the state. Section 4 [1] of that amendment provides for certain instances in which a losing party before a Division has a *right upon application* to have the cause transferred to the court en banc. In addition,

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[1] "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; *or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court* for its decision" (Italics ours).

Section 4 provides " * * * when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

None of the instances pursuant to which the petitioner would have a *right* to review by the court en banc existed in this case and, therefore, it could be heard and passed upon by the Supreme Court of Missouri en banc only if Division Two of the Court in the exercise of its discretion ordered it transferred to the court en banc.

Division Two did not order the cause transferred nor did petitioner at the time of that Division's decision move Division Two to order the cause transferred because that was a matter solely within the discretion of the Court.

After this Court denied your petitioner's original petition for a writ of certiorari (Exhibit A) stating "as it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction", your petitioner requested Division Two of the Missouri Supreme Court to exercise its discretion (R. 569). The Respondents moved to strike petitioner's motion (R. 574) and upon consideration of the motions of petitioner and respondent the Court sustained respondents' motion to strike (R. 588).

Questions Presented.

In addition to questions arising under the Federal Employers' Liability Act as amended, effective August 11, 1939, (45 U. S. C. A. 51 *et seq.*), 52 Stat. 1404, which are set forth on pages 19 and 20 of Exhibit "A" to this petition and to which we respectfully refer the Court's attention, is the question:

(1) Has your petitioner exhausted the appellate review provided by the laws of the State of Missouri?

Reasons Relied On for Allowance of Writ.

We shall not repeat herein the reasons for the allowance of the writ as those reasons are addressed to the petitioner's rights under the Federal Employers' Liability Act, but we respectfully request that the court refer to pages 21 *et seq.* of Exhibit "A" of this petition. In addition to the reasons set forth therein we rely on the reason that:

Petitioner has exhausted all of the appellate review provided by the laws of the State of Missouri.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under seal of this Court, directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of *Eugene W. Osment, Respondent* v. *Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants,* No. 35575, to the end that this cause may be reviewed and determined by this Court, as provided for in the Statutes of the United States, and that the findings and rulings of said Supreme Court to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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